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No. 94-1620

In the

Supreme Court of the United States

October Term, 1994

WILLIAM E. KIRWAN, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent's brief in opposition underscores the importance of the issues that this case presents and makes several points that warrant a response.

1. Respondent expressly concedes that "hundreds of colleges and universities administer race-based scholarship programs. . . ." Br. at 10. *See also* Brief of *Amici Curiae* American Council on Education, *et al.*, at 7 ("more than 80 percent of institutions surveyed . . . have aid programs for which minority status was a criterion."). He also acknowledges, by his silence, that more than 45,000 students annually benefit from these

programs. *See* 56 Fed. Reg. 64548 (1991). There is no question, therefore, that the issues here have nationwide implications.

2. Respondent's position appears to be that *affirmative* steps may *never* be taken to remedy the effects of past discrimination, even when an official finding of discrimination has been made. "[A] state's only obligation in the area of higher education," respondent argues, "is to eliminate unwarranted 'policies and practices traceable to its prior system that continue to have segregative effects.'" Br. at 15-16 (*quoting United States v. Fordice*, 112 S.Ct. 2727, 2737 (1992)). But *Fordice* did not hold that a State may never take affirmative steps to remedy past discrimination -- or, to put it another way, that the available remedies are limited to eliminating present policies. To be sure, eliminating policies that continue to have segregative effects is required under *Fordice*. In appropriate cases, however, States have the authority not simply to eliminate current practices or policies, but to implement "affirmative steps" to eliminate lasting effects of past discrimination. *Id.* at 2743. Indeed, in *Fordice* itself, the district court on remand not only ordered the elimination of certain practices, but also required the adoption of race-based scholarship programs. *See Ayers v. Fordice*, 1995 U.S. Dist. LEXIS 3467, at *264-65 (N.D.Miss Mar. 7, 1995).

3. The court of appeals did not even consider, much less reverse, the district court's determination that the Banneker Program has no adverse impact on non-black students. Respondent argues, however, that "all UMCP students were substantially burdened by the Banneker Program, since its $1.2 million annual cost came from UMCP funds, funds that are raised in large

measure through student tuition charges." Br. at 23. The district court stated, however, that "if the Banneker Program were discontinued, the funds which it utilizes would not be placed into general scholarship funds but would be channeled into other desegregation programs." (App. 87a n.76.) Respondent also does not disagree, moreover, that Banneker scholarships are awarded after admission decisions are made. (App. 87a.) Thus, as the district court found, a Banneker scholarship has no effect on the admission of any student and so does not give rise to any undue burden. (*Id.*)[1]

4. Respondent acknowledges that the issue whether the Banneker Program serves the compelling interest of attaining a diverse student body raises "important constitutional questions." Br. at 29. He nevertheless states that the diversity issue is not "properly

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[1] Respondent suggests incorrectly that UMCP has been able to attract as many blacks through a temporary combined Banneker-Key program, in which race is considered as one of several factors in determining scholarship awards, as it was able to recruit under the program that the court of appeals invalidated. *See* Br. at 21 and n.15. As an initial matter, the record contains no information at all about the temporary program that respondent describes, as that program is not being challenged in this case. In any event, significantly fewer blacks have been awarded scholarships under this temporary program in 1995 (19) than those that received Banneker scholarships in 1994 (36). Moreover, while the Banneker Program is tailored to demonstrate "that a traditionally white school is interested in minority students," Brief of the United States as *Amicus Curiae* at 17, and thus has helped UMCP overcome an adverse reputation in the black community and a racially hostile campus climate, the temporary program that respondent discusses accomplishes none of this.

before the Court" because "the Kirwan Petitioners did not seek to defend the Banneker Program based on a 'diversity' rationale" when respondent first sought summary judgment in this case. *Id.* The record demonstrates that this simply is not true.[2] Further, respondent does not dispute that after the remand, the University made explicit findings that the Banneker Program was justified as a measure to promote student diversity. Nor does respondent dispute that the University thereafter proceeded to defend the Banneker Program on diversity grounds both before the district court and the court of appeals. While neither court below addressed the diversity issue on remand, petitioners raised and preserved that issue, and an extensive record exists on which this Court may resolve the question.

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[2] In fact, citing petitioners' summary judgment memorandum, respondent in the court below specifically stated that the petitioners "argue that the States may still use the Banneker Program 'to eliminate [the effects of] discrimination from their systems of education' *and promote racial diversity*." February 25, 1991 Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross Motion for Partial Summary Judgment at 26 (emphasis added). Respondent also conceded that "defendants may conduct carefully constructed and narrowly framed, voluntary affirmative action programs to increase racial diversity at UMCP. . . ." *Id.* at 26-27. In addition, as the court of appeals subsequently noted in *Podberesky I*, the State of Ohio filed an *amicus* brief raising diversity as a separate rationale for the Banneker Program. (App. 103a n.4.)

CONCLUSION

For the reasons stated above and in the Petition, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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